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Supreme Court, U.S.
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No. 00-499

In The

Supreme Court of the United States

KEVIN THOMAS AND JOYCE BAKER,

Petitioners,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, MUNICIPALITY OF ANCHORAGE, and PAULA HALEY, in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly applied well-settled standing and ripeness principles when it dismissed the landlords' pre-enforcement challenge to state and municipal laws prohibiting discrimination in the rental of housing based upon a tenant's marital status, where the record demonstrates that:

1. no prospective tenant has ever complained to the landlords;

2. no prospective tenant has ever filed an administrative complaint against the landlords with any civil rights enforcement agency;

3. neither the state nor the municipality has ever initiated an investigation into the landlords' rental practices;

4. neither the state nor the municipality has ever commenced a civil enforcement action or criminal prosecution against the landlords under the challenged laws;

5. no civil rights enforcement agency has ever threatened the landlords with future enforcement of the challenged laws;

6. the landlords cannot identify any prospective tenants they turned away due to their marital status in the past;

7. the landlords do not know to whom, when, where or under what circumstances they might violate the challenged laws in the future;

8. past enforcement of the challenged laws was civil only, and was always precipitated by the filing of complaints by potential tenants;

QUESTION PRESENTED – Continued

9. the landlords' asserted injury is speculative and may never occur; and

10. the landlords will suffer no hardship if a federal court declines to consider their case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF FACTS AND PROCEEDINGS 1

REASONS FOR DENYING THE WRIT 2

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISIONS ADDRESSING ARTICLE III STANDING AND RIPENESS 3

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS FROM OTHER COURTS OF APPEAL 14

III. THIS CASE DOES NOT RAISE UNANSWERED QUESTIONS OF CONSTITUTIONAL LAW 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999) 19

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) ..8, 13

Babbit v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) 5, 13

Baker v. Carr, 369 U.S. 186 (1962) 3

Bennett v. Spear, 520 U.S. 154 (1997) 3

Buckley v. Valeo, 424 U.S. 1 (1976) 3

Doe v. Beaumont Ind. Sch. Dist., 173 F.3d 274 (5th Cir. 1999) 17

Doe v. Bolton, 410 U.S. 179 (1973) 7, 9, 10

EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1980) 13

Epperson v. Arkansas, 393 U.S. 97 (1968) 7

FEC v. Akins, 524 U.S. 11 (1998) 8

Flast v. Cohen, 392 U.S. 83 (1968) 3

Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199 (Alaska 1989) 1

Golden v. Zwickler, 394 U.S. 103 (1969) 4

Hays v. Urbana, 104 F.3d 102 (7th Cir. 1997) 18

Laird v. Tatum, 408 U.S. 1 (1972) 4, 7, 11

Los Angeles v. Lyons, 461 U.S. 95 (1983) 7

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 3

TABLE OF AUTHORITIES – Continued

Page

Minnesota Citizens Concerned for Life v. Federal Election Comm., 113 F.3d 129 (8th Cir. 1997)..... 18

National Rifle Ass'n v. Magaw, 132 F.3d 272 (6th Cir. 1997)..... 17

Navegar, Inc., v. United States, 103 F.3d 994 (D.C. Cir. 1997) 17

North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999)..... 16

Nutritional Health All. v. Shalala, 144 F.3d 220 (1998) 15

O'Shea v. Littleton, 414 U.S. 488 (1974).....4, 7

Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190 (1983) 13

Pierce v. Society of Sisters, 268 U.S. 510 (1925)..... 8

Poe v. Ulman, 367 U.S. 497 (1961) 3, 12

Presbytery of New Jersey v. Florio, 40 F.3d 1454 (3rd Cir. 1994) 16

Renne v. Geary, 501 U.S. 312 (1991)..... 7

Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993) 8, 9

Rhode Island Assoc. of Real., Inc. v. Whitehorse, 199 F.3d 26 (1st Cir. 1999) 15

School District of Abington v. Schempp, 374 U.S. 203 (1963) 8

TABLE OF AUTHORITIES – Continued

Page

Steffel v. Thompson, 415 U.S. 452 (1974) 5, 6

Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska), *cert. denied*, 513 U.S. 979 (1994) 11

Texas v. United States, 523 U.S. 296 (1998) 11

Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000) ..... *passim*

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 4

Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988) 7, 8, 9, 10

Whitmore v. Arkansas, 495 U.S. 149 (1990) 3

Younger v. Harris, 401 U.S. 37 (1971) 13

STATUTES AND OTHER AUTHORITIES

U.S. Const. art. III ..... *passim*

28 U.S.C. § 2201 4

Alaska Stat. § 18.80.240 (1987) 1

TABLE OF APPENDICES

Affidavit of Paula M. Haley, Dated December 15, 1995 ..... App. 1

STATEMENT OF FACTS AND PROCEEDINGS

Respondent Paula M. Haley, in her official capacity as Executive Director of the Alaska State Commission for Human Rights ("ASCHR"), adopts and incorporates by reference the statement of facts and proceedings contained in the decision of the United States Court of Appeals for the Ninth Circuit in *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000); Pet. App. A (App. 1a). In *Thomas*, the court dismissed without prejudice the claims of Joyce Baker and Kevin Thomas ("the landlords") for their standing and ripeness deficiencies. *Id.* at 1142. Their claims are based upon the following facts.

The landlords own residential rental property in Anchorage, Alaska. They filed suit, seeking a religious exemption from Alaska's anti-discrimination in housing statute, which prohibits landlords from discriminating against tenants based on their marital status. Alaska Stat. § 18.80.240 (1987). Under Alaska law, "marital status" discrimination includes discrimination against unmarried couples. *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199, 1202 (Alaska 1989).

The landlords allege that, according to their Christian beliefs, cohabitation between unmarried couples is a sin. They believe that renting housing to an unmarried couple would facilitate sin, and that to facilitate sin is to sin themselves. They allege that they fear Respondent Haley – who oversees investigations of discrimination complaints filed with ASCHR – will enforce the anti-discrimination law against them, which they allege would violate the free exercise of their religion. No one has ever filed a

discrimination complaint with ASCHR against the landlords, and Respondent Haley has never threatened them with enforcement of the Alaska's anti-discrimination-in-housing law or with any other statute. (Resp. App. 3).

REASONS FOR DENYING THE WRIT

The court of appeals properly dismissed the landlords' declaratory judgment action because it fails to present a justiciable case and controversy under Article III of the United States Constitution. None of the criteria governing certiorari warrant this Court's review of that decision. The decision is consistent with Supreme Court cases addressing Article III standing and ripeness requirements as applied to the unique and specific facts of this case. The decision rests solely upon the landlords' own failure to set forth facts sufficient to satisfy well-settled standing and ripeness requirements as articulated by this Court. Further, it creates no conflict among the federal courts of appeals. The cases from other circuits that the landlords cite involve application of the same well-settled principles of Article III and are based upon particular factual situations not present here. Finally, this case does not raise important unanswered questions of constitutional law. Accordingly, this Court has no reason to review this case.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISIONS ADDRESSING ARTICLE III STANDING AND RIPENESS.

The court of appeals applied well-settled principles of standing and ripeness to the particular facts of this case, and concluded that because the landlords failed to establish a credible threat of prosecution, they did not present a ripe case. As the parties attempting to invoke federal jurisdiction, the landlords have the burden to set forth facts sufficient to satisfy the standing and ripeness requirements of Article III.[1] *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997).

A federal court cannot create jurisdiction by embellishing otherwise deficient allegations that fail to satisfy the requirements of Article III. *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990). Consequently, "[t]he jurisdictional

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[1] Standing is the constitutional requirement under Article III that a plaintiff allege a judicially cognizable injury in order to pursue the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992). The essence of a standing question is whether the plaintiff has alleged "such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Thus, standing focuses on the party bringing suit, not on the issues he or she wishes to be adjudicated. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Ripeness is "peculiarly a question of timing" and is drawn both from Article III limitations on judicial power and from prudential considerations for refusing to exercise jurisdiction. *Buckley v. Valeo*, 424 U.S. 1, 114 (1976). The ripeness doctrine precludes federal courts from exercising their jurisdiction over an action that is filed before a real dispute exists between the parties. *Poe v. Ulman*, 367 U.S. 497, 507 (1961).

power of the United States defined by Article III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Rather, issues of constitutionality must be resolved in the context of a concrete factual dispute, not based on hypothetical factual scenarios. *Id.* at 472.

The plaintiffs in this case present only hypothetical harm, because without the existence of an unmarried couple seeking to rent from them, they are faced with no actual conflict between their religious beliefs and the law. A federal court cannot exercise jurisdiction unless the plaintiff has sustained or is immediately in danger of sustaining a direct injury as a result of the challenged statute.[2] *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). This constitutional requirement of an immediately threatened, direct injury is glaringly absent from this case. "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).[3]

While a plaintiff does not always have to await actual arrest or prosecution before proceeding with a challenge to a state statute in federal court, *see Thomas*, 220 F.3d at

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[2] Claims implicating the First Amendment have in no way eroded this requirement. *Laird v. Tatum*, 408 U.S. 1, 13 (1972).

[3] The statute authorizing a federal court to declare the rights of litigants by its terms limits such a remedy to cases of "actual controversy." 28 U.S.C. § 2201.

1140 (citing *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)), a plaintiff must allege an intention to engage in constitutionally protected conduct that is proscribed by the statute and must face a "credible threat" of enforcement. *Babbit*, 442 U.S. at 298. In *Babbit*, the United Farm Workers challenged a state statute prohibiting unions from making "dishonest" statements during publicity campaigns aimed at convincing consumers to boycott agricultural products. The union interpreted this as forbidding even inadvertent misstatements. *Id.* at 301, 309. The Court viewed unintentional misstatements as "inevitable" in such campaigns. *Id.* at 301. The Court upheld the union's standing on the basis that the statute, as so interpreted, prohibited the union from engaging in speech arguably protected by the First Amendment. The Court explained that the standing and ripeness requirements may be satisfied in the pre-enforcement context if a plaintiff intends to engage in constitutionally protected conduct that is proscribed by the statute and there is a "credible threat" that the statute will be enforced against the plaintiff. *Id.* at 298. The union faced a credible threat of prosecution because its members "inevitably" would violate the statute as the union interpreted it. *Id.* at 302.

Similarly at risk of imminent prosecution was the plaintiff in *Steffel v. Thompson*, 415 U.S. 452 (1974), who was threatened with arrest by police officers for violating Georgia's criminal trespass statute by distributing anti-Vietnam War handbills at a mall. *Id.* at 459. When threatened with arrest, he left the area, but his companion remained and was arrested. The plaintiff brought a declaratory judgment action to challenge the constitutionality of the statute. The Court concluded that it was

unnecessary for the plaintiff to expose himself to actual arrest or prosecution where the alleged threats of prosecution were not "imaginary or speculative," but created a concrete case or controversy susceptible to conclusive judicial determination. *Id.* at 459. The Court found significant that the plaintiff had been "twice warned to stop handbilling," was actually threatened with prosecution by the police, and that the parties had stipulated that if the plaintiff returned to the mall to distribute handbills he probably would be arrested. *Id.* at 455-56 & n.4.

In contrast, the record in this case fails to demonstrate a credible threat of prosecution. Almost five years have passed since the landlords filed their action, and no one has filed a complaint against them. They have no reason to believe that Respondent Haley or ASCHR will now bring an enforcement action against them, without any complaining tenants. Far from "inevitable," the injury they fear is quite speculative – that if and when they someday have a vacancy in their few rental units, an unmarried couple will apply to rent it; they will turn the prospective tenants away; those tenants will file a complaint with the state; and the state will enforce the law against them.

The court of appeals applied these facts to this Court's well-settled principles of standing and ripeness to conclude that the record suggests no credible threat of prosecution. *Thomas*, 220 F.3d at 1141. Enforcement of the challenged statute against these landlords is not inevitable, or even probable; the landlords' perceived threat of prosecution is speculative, and created solely to secure an advisory federal court decision. Under these circumstances, the court of appeals' decision dismissing the landlords' case is entirely consistent with this Court's

precedent involving standing and ripeness in pre-enforcement actions. *See O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (plaintiff's pre-enforcement claim drifted "into the area of speculation and conjecture"); *Renne v. Geary*, 501 U.S. 312, 321-22 (1991) ("no factual record of an actual or imminent application of [the challenged statute] sufficient to present the constitutional issues in 'clean-cut and concrete form' "); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (plaintiff's fear of someday enforcement insufficient to constitute an injury under Article III); *Los Angeles v. Lyons*, 461 U.S. 95, 104 (1983) (no standing where the plaintiff feared that, in a future encounter with police, the officers might administer an allegedly illegal "chokehol[d]").[4] To hold otherwise would require a court to speculate on the basis of hypothetical allegations to render a decision – a position clearly at odds with the dictates of Article III.

The landlords claim that the decision below conflicts with this Court's holding in *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988) and *Doe v. Bolton*, 410 U.S. 179 (1973). Pet. at 14.[5] This case is quite different,

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[4] The landlords' claim that they have turned away unmarried tenants in the past is insufficient to constitute a present case or controversy. In *Lyons*, the Court dismissed the case despite the fact that members of the class had been subjected to the chokehold. The Court found that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects." 461 U.S. at 102 (quoting *O'Shea*, 414 U.S. at 495-96.)

[5] The landlords also cite a litany of other Supreme Court decisions that are distinguishable. In *Epperson v. Arkansas*, 393 U.S. 97 (1968), a teacher was allowed to challenge a statute

however, because Alaska's law has had no "chilling" effect on the landlords' behavior. In *Booksellers*, the plaintiff

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prohibiting the teaching of evolution in schools. As the statute had never been enforced, it may have been "more of a curiosity than a vital fact of life" to address the constitutionality of the law. *Id.* at 102. The Court did not discuss justiciability or the credible threat of prosecution requirement. The landlords' reliance on *School District of Abington v. Schempp*, 374 U.S. 203 (1963), is also misplaced. That case involved standing requirements under the Establishment Clause of the First Amendment and involved the rights of parents to bring actions on behalf of their children. *Id.* at 225 n.9. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a private school had third-party standing to assert the rights of its students and parents to enjoin enforcement of a law compelling children to attend public schools in the districts in which they reside. *Id.* at 535-36. Standing was appropriate because injury to the private school was present and irreparable since the children would be prohibited from attending their schools. *Id.* In *FEC v. Akins*, 524 U.S. 11 (1998), this Court held that voters' inability to obtain information required to be released under the Federal Election Campaign Act satisfied the "injury in fact" requirement for Article III standing. The Court noted that statutory language permitting "any person aggrieved by an order of the commission" to file suit in federal court evinced a congressional intent to "cast the standing net broadly," thereby eliminating traditional prudential standing concerns. *Id.* at 20. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), is distinguishable because the challenged regulation there had a direct effect on the day-to-day business of the plaintiffs and required them to expend substantial sums of money to comply with the regulations. *Id.* at 152-53. Here, the anti-discrimination statute has no effect on the day-to-day business of the landlords, and may never affect them in the future. It also does not cause any economic hardship. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993), is also of no help to the landlords. In *Reno*, the claims of illegal aliens challenging Immigration and Naturalization Service temporary resident regulations were not ripe simply

bookstores filed a pre-enforcement facial challenge to a newly-enacted state criminal statute forbidding any person selling sexually explicit materials from displaying them in a manner that would allow juveniles to "examine and peruse" them. 484 U.S. at 387. The booksellers sought to assert the First Amendment rights of adult book buyers in challenging the statute, because the law could limit an adult's access to protected materials. *Id.* at 392-94. The Court concluded that the plaintiffs had standing to challenge the statute prior to its enforcement both because they alleged an actual and well-founded fear that the law would be enforced against them and because the statute had a "chilling effect" on First Amendment activity in censoring free speech – "a harm that can be realized even without an actual prosecution." *Id.* at 393.

Similarly, in *Doe v. Bolton*, 410 U.S. 179 (1973), Georgia physicians had standing to challenge state criminal abortion statutes because of the law's "chilling effect." Although the record disclosed that none of them had been prosecuted in the past, the abortion statute at issue was the successor to another Georgia statute under which physicians were actually criminally prosecuted. *Id.* at 188-89. Since the physicians were regularly consulted by pregnant women, there was a reasonable certainty that they would be prosecuted. The physicians had further alleged a sufficiently injurious "chilling effect" upon their professional conduct (i.e., they were deterred from advising patients to have abortions) to enable them to challenge the statute on behalf of their patients. In any event, since the patients already had standing to challenge the statute in their own right, it was "a matter of no great consequence" that the

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because of promulgation of the administrative regulation. *Id.* at 59.

physicians also were found to have standing. *Id.* at 188. Like the plaintiffs in *Booksellers*, the physicians' only possible opportunity to assert their constitutional rights and the rights of others would have been in a criminal prosecution under the challenged statute.

Unlike the plaintiffs in *Booksellers* and *Bolton*, the landlords in this case can challenge the law in civil administrative proceedings if and when an agency actually brings an enforcement proceeding against them. More significantly, the record here demonstrates that the law has *not* chilled their First Amendment rights. The statute has not dissuaded the landlords from involving themselves in the residential rental business despite their religious beliefs, and they readily admit that they refuse to rent their property to unmarried couples despite the law:

> We decline to rent to unmarried couples, not so that we can try to control their conduct, but instead so that we can control our own conduct and try to conform our own conduct to be consistent with what we understand and believe to be God's command for us.
>
> My husband and I never hide, conceal, or lie about our Christian beliefs regarding cohabitation, and we are honest with unmarried couples as to why we don't rent to them. We do this because as Christians we believe it would be contrary to God's will for us to lie or be untruthful with other people. We also believe it would be wrong to hide our Christian beliefs, since we believe that the Lord Jesus desires us to stand up and be recognized as his children and followers.

Affidavit of Joyce Baker (Pet. App. 174a); *see also* Affidavit of Kevin Thomas (Pet. App. 168a). Thus, the law

has not deterred or chilled the landlords' religious practices. They do not engage in any form of self-censorship and have not changed their behavior because of the statute. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

Any injury to the landlords depends upon the occurrence of unforeseeable future events.[6] Whether they retain their rental properties, whether the properties ever became available for rent, whether an unmarried cohabiting couple will ever seek to lease their available rental property, and whether an unmarried cohabiting couple will ever complain of discrimination to ASCHR is unknown and unknowable. In the proceedings below, the landlords could not articulate to whom, when, where or under what circumstances they had refused to rent in the past, and although they pledged to violate the law in the future, they could not articulate to whom, when, where or under what circumstances. Given that state prosecution of the landlords for discrimination rests on a string of uncertain contingencies, it may seem curious that they affirmatively sought a declaratory judgment on the law's constitutionality. The reason they do not want to wait to see if Respondent Haley will ever enforce the law against them is because they disagree with the Alaska Supreme Court decision on the issue in *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska), *cert. denied*, 513 U.S.

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[6] A claim that rests upon contingent future events that may or may not occur as anticipated or may not occur at all is not ripe for adjudication. *Texas v. United States*, 523 U.S. 296, 300 (1998).

979 (1994) – thus they are strongly motivated to seek a preemptive advisory decision from the federal court to avoid state court. *See* Petition at 5 & n.7.

The fact that Alaska Supreme Court precedent may govern the landlords' claims in state court is not a basis for standing in federal court, however. In effect, the landlords seek a federal injunction aimed at preventing a state court prosecution based upon the occurrence of future events that might never take place. The Court should respect the state court's ability to interpret and apply federal constitutional law, and assume that the process for seeking review on a writ of certiorari will correct any misinterpretation by state courts. The landlords' attempt to seek an advisory opinion in federal court signals that no harm has yet occurred to them and that they do not want to wait until a credible threat of prosecution exists. Their fear of prosecution is based primarily on the fact that they have identified themselves by filing this case. They should not be able to manufacture standing by claiming a threat of prosecution that they created by attempting to invoke federal court jurisdiction.

The court of appeals' dismissal of the landlords' claims is consistent with this Court's teachings "not to entertain constitutional questions in advance of the strictest necessity." *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (mere allegation that state attorney intended to prosecute any offense under state law insufficient to establish "credible threat of prosecution" for purpose of ripeness). The landlords' fear of arrest or prosecution is imaginary and speculative. The decision below is correct since the landlords could not point to a single prospective tenant that they have turned away because of marital status and

they have never been subject to a complaint despite their participation in the rental business for over ten years. Without an identifiable act of discrimination, a federal court does not have a tangible and concrete factual case and controversy under Article III.

Despite the landlords' arguments to the contrary, the decision below does not conflict with Supreme Court precedent or establish a new test for justiciability. "When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Thomas*, 220 F.3d at 1140 (citing *Babbit*, 442 U.S. at 298-99 and *quoting Younger v. Harris*, 401 U.S. 37, 42 (1971)). The court of appeals merely applied this Court's well-established precedent to the specific facts of this case.[7]

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[7] In evaluating the prudential aspect of ripeness, the court of appeals applied the two-part test established by this Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). *Thomas*, 220 F.3d at 1141. In evaluating both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration, the court properly declined jurisdiction over the landlords' case. *Id.* at 1141-42. In this regard, the court of appeals' decision does not conflict with the cases cited at n.48, p. 25 of the landlords' petition, which were ripe for adjudication because the issues involved in those cases were purely legal and a failure of judicial review would have caused substantial hardship to the plaintiffs. *See, e.g., EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 (1980); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 201-202 (1983).

The question of whether there is a sufficient threat of prosecution to allow a pre-enforcement challenge is factual and case-specific. The decision below turns upon the unique facts of this case. The decision is correct based upon the record and this Court's well-settled standing and ripeness principles. It is not in conflict with governing Supreme Court precedent. Therefore, the Court has no need to review this case.

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS FROM OTHER COURTS OF APPEAL.

The landlords assert that the Ninth Circuit's *en banc* decision conflicts "directly and in principle" with decisions of the other United States Courts of Appeal. Pet. at 26-29. To support this assertion, the landlords cite cases from circuits other than the Ninth Circuit where the courts found justiciability. In each case, however, the court merely applied existing, well-settled rules for determining the existence of a case or controversy. These cases support the proposition that the ripeness of a pre-enforcement challenge must be determined on a case-by-case basis, and the landlords' case presents a factual situation that is not ripe for federal court review. Unlike the cases the landlords cite, the harm in this case is hypothetical with no real and substantial probability that the enforcement against them will ever occur.

Beginning with the acknowledgement that "inquiries of this sort are both context-contingent and situation-specific," the First Circuit found justiciability in a case the landlords cite by focusing on facts establishing that (a)

the challenged statute had severe criminal sanctions for noncompliance; (b) the plaintiff had been given a direct warning, indicating that the intended conduct would in fact be punished; and (c) the activity that the plaintiff proposed to undertake was discrete and well-defined. *Rhode Island Assoc. of Real., Inc. v. Whitehorse*, 199 F.3d 26, 28-32 (1st Cir. 1999). In contrast, in this case (a) the only "sanctions" sought in the only two cases ever brought under the statute were civil compliance orders, not criminal penalties, (b) far short of having received a warning, the landlords were completely unknown to the enforcement agency until they filed this action, and (c) the landlords merely aver that at some unknown time in the future, if tenants to which they object come along, they intend to violate the provisions. The "frank consideration of the totality of the circumstances," such as the First Circuit conducted, *id.* at 31, establishes that the landlords here do not face a credible threat of prosecution, and thus their claims are not justiciable.

The Second Circuit case that the landlords cite, *Nutritional Health All. v. Shalala*, 144 F.3d 220, 227 (1998), is wholly inapposite. The court found to be ripe the plaintiffs' claim that their free speech was infringed for the year-and-a-half that the government evaluated whether they could make certain health claims, because they were *necessarily* suffering the restraint, which was an actual, direct, concrete injury. *See also id.* at n.4 (also finding a separate pre-enforcement claim to be unripe and nonjusticiable because plaintiffs had not identified a particular, specific health claim that they wanted to make, nor had they sought approval and been denied).

The Third Circuit case the landlords cite also is distinguishable on its facts. The court determined that the state's promise not to prosecute a minister for speaking against homosexuals was not full and complete, and thus did not erase the potential threat of prosecution of his church. *Presbytery of New Jersey v. Florio*, 40 F.3d 1454, 1458-64 (3rd Cir. 1994). The court then analyzed the complaint's ripeness without regard to the state's empty promise, and found that the church did face a credible threat, because the minister consistently preached using discriminatory language, and was continually discriminating in his position as church reverend. In contrast, the landlords merely claim that if and when unmarried cohabitors seek to rent their apartments, they would then engage in the forbidden conduct. Such a speculative, conditional claim falls short of the consistent and forceful speech in *Florio*. *See also id.* at 1473 (no real and substantial threat of enforcement where, in the two years that the law had been in effect, no suit or complaint had been filed) (Rosenn, C.J., dissenting).

The Fourth Circuit found a pre-enforcement claim justiciable where an anti-abortion group sought to distribute certain advocacy literature without complying with the state's election laws. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 709-11 (4th Cir. 1999). The court focused on the chilling effect of the challenged laws on the group's free speech rights, however, and found to be reasonable the group's fear that it would be prosecuted for the distribution. The landlords' case has very different prudential concerns than those present in a literature-distribution case – namely, without any particular "victims" of past discrimination, or any specific names,

words, time, or context with respect to intended future discrimination, the record is devoid of a concrete factual situation, and is not fit for judicial review.

Nor is the landlords' example of the Fifth Circuit's "conflict" inconsistent with the Ninth Circuit's decision on the justiciability of this case. In *Doe v. Beaumont Ind. Sch. Dist.*, 173 F.3d 274, 283 (5th Cir. 1999), the court granted standing to students who attended a school where students were randomly selected for counseling by clergy, without advanced notice or consent, because those children were in a pool of students from which participants were chosen. The court concluded that the students were actually threatened with harm by the program and thus had the proper "injured party" status. *Id.* at 285. The court based this holding in part on the nature of an establishment clause claim, under which there is no need to wait for actual violations of a plaintiff's rights, and where there are heightened concerns with protecting children's freedom of conscience from coercive pressure in public school. *Id.* at 284.

The landlords' purported support from the Sixth and D.C. Circuit Courts also is unpersuasive. These courts heavily rely upon the plaintiffs' substantial economic injury, and the "inevitable" enforcement against them. *See National Rifle Ass'n v. Magaw*, 132 F.3d 272, 285, 289 (6th Cir. 1997) (gun manufacturer's pre-enforcement challenge to law prohibiting manufacture of certain semiautomatic weapons was justiciable where the law had sufficient "chilling effect," caused economic hardship, and where the government intended to enforce the law against *this* plaintiff); *Navegar, Inc., v. United States*, 103 F.3d 994, 1000 (D.C. Cir. 1997) (pre-enforcement challenge allowed

where gun manufacturer's failure to comply with Crime Control Act would inevitably lead to prosecution). Unlike those plaintiffs, the landlords are not suffering substantial economic hardship because of the challenged law. The threat of enforcement against the landlords is hardly inevitable here, given that there are no past or potential identifiable "victims" of the discrimination that could give their case the proper parameters of a concrete controversy.

The Seventh Circuit follows the general standing rule that a "concrete injury" is necessary, and denied standing where a plaintiff attempting to bring a pre-enforcement claim could not show economic injury from the challenged ordinance. *Hays v. Urbana*, 104 F.3d 102, 103-04 (7th Cir. 1997) (concluding that since the plaintiff could not prove that it had "costs of compliance necessary to avoid prosecution," it lacked standing). This conclusion does not conflict with the Ninth Circuit's decision in this case. Rather, it supports the conclusion that because the landlords have not alleged economic injury and indeed have pointed to no other concrete injury that could substitute for economic costs, the case is not justiciable.

Illustrating yet again that the justiciability question is highly fact-specific, the Eighth Circuit determined that where a federal election regulation could chill an activist organization's rights, and where that regulation carried criminal penalties, a sufficient case or controversy existed to allow the pre-enforcement challenge. *Minnesota Citizens Concerned for Life v. Federal Election Comm.*, 113 F.3d 129, 130-31 & n.4 (8th Cir. 1997). That case involved political expression and a facial challenge to a regulation not present here.

Finally, in yet another case focusing on the "chilling" effect of a challenged statute, the Tenth Circuit found standing and ripeness where the ACLU and internet providers challenged a law criminalizing computer dissemination of sexually explicit materials to minors. *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). The threat of actual criminal prosecution was real and imminent. *Id.* at 1154-55.

All these cases the landlords cite demonstrate that other Circuit Courts of Appeals consistently apply the same well-settled legal standards to determine whether a claim is justiciable and fit for pre-enforcement review. Pointing out a number of decisions where justiciability was found does not establish that there is a conflict in the legal principles, but rather demonstrates that in this area of the law, the particular facts presented in each case determine the outcome. Because standing and ripeness issues are so dependent upon specific factual circumstances, it cannot be said that the court of appeals' decision in *Thomas*, which applied the well-settled legal standards articulated by this Court, conflicts with other Courts of Appeals' decisions under Article III.

III. THIS CASE DOES NOT RAISE UNANSWERED QUESTIONS OF CONSTITUTIONAL LAW.

This case does not involve important recurring questions of unanswered federal constitutional law regarding standing and ripeness requirements under Article III. The requirements for standing and ripeness are well-settled and have already been addressed by this Court. The

decision below affects only the landlords and no other parties bringing pre-enforcement challenges.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Dated: January 2, 2001

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In Her Official Capacity
As Executive Director of ASCHR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

GARY BAKER, JOYCE BAKER and KEVIN THOMAS, Plaintiffs, v. ANCHORAGE EQUAL RIGHTS COMMISSION, MUNICIPALITY OF ANCHORAGE, and PAULA HALEY in her official capacity as the EXECUTIVE DIRECTOR OF THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS, Defendants.	Case No. A95-274 CI (HRH) Consolidated

AFFIDAVIT OF PAULA M. HALEY

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Paula M. Haley, being first duly sworn, deposes and states:

1. I am the Executive Director of the Alaska State Commission for Human Rights ("ASCHR" or the "Commission"). ASCHR is the agency of the State of Alaska charged with the duty of administering and enforcing the Alaska Human Rights Act, AS 18.80.010 – .300 ("the Act"). I have been the Executive Director of ASCHR since October 1988.

2. As Executive Director of ASCHR, I oversee the fiscal activities of the Commission. This includes the preparation of the agency's budget and the expenditure of appropriated funds. I also implement agency policy regarding human rights as established by the commissioners in public hearing decisions and Commission meetings. The Commission consists of seven commissioners appointed by the governor for staggered terms of five years and confirmed by the legislature. The commissioners set agency policy and issue decisions based upon their understanding of the Act.

3. I supervise all agency staff. The staff is comprised of eight investigators, a director of central investigations, a director of special investigations, staff attorney, and an administrative officer. There are also four clerical employees.

4. The investigators investigate whether a complaint filed by an individual alleging a violation of the Act is supported by substantial evidence. The procedures for individuals filing complaints are set out in AS 18.80.100 and 6 AAC 30.210. Basically, any individual who believes he or she has been discriminated against in violation of the Act can file a complaint. I can also file a complaint of discrimination on behalf of an individual or class of persons when acts or practices allegedly in violation of the Act come to my attention. *See* AS 18.80.100; 6 AAC 30.220.

5. I have reviewed the motion for summary judgment filed by Gary Baker, Joyce Baker, and Kevin Thomas. I never heard of these individuals until they filed an amended complaint naming me as a defendant. I checked ASCHR's records and found that there has never been a complaint filed by an individual against Gary Baker, Joyce Baker, or Kevin Thomas with the Commission. In addition, I have never filed a complaint against these individuals in my capacity as Executive Director.

6. I also checked to see if the Commission's staff has ever investigated a housing discrimination complaint where a landlord has raised a freedom of religion defense. There have been no such cases. As a result, I have never reviewed any investigator's findings recommending that there is substantial evidence of discrimination in cases involving religious issues as raised by the Bakers and Kevin Thomas.

7. I am familiar with the work-share agreement in effect between ASCHR and the AERC. The work-share

agreement consists of a Letter Agreement and a Memorandum of Understanding between ASCHR and the AERC. These documents are attached to my affidavit as Exhibit A. The purpose of the work-share agreement is to efficiently coordinate the handling of discrimination complaints alleging a violation of the Act and Title 5 of the Anchorage Municipal Code (AMC 5.10.010). It also avoids duplicative administrative investigations. The agencies make independent decisions regarding the applicability of the law or ordinance they are charged to enforce. As noted in the memorandum of understanding, ASCHR is responsible for enforcement of the provisions of the Alaska Human Rights Act, AS 18.80.010 – .300 AERC has no authority to enforce the provisions of AS 18.80 or act on the Commission's behalf under the agreement. The only entity that can enforce Title 18 is ASCHR. However, the Act does provide for private right of actions to enforce its provisions under AS 18.80.145 and AS 22.10.020 (I).

8. Under the work-share agreement, each agency must inform a person filing a complaint of their right to file a complaint with the other agency, if appropriate. *See* Letter of Agreement section IVA. Each agency has to inform the individual filing the complaint that their complaint will be dual-filed with the other agency unless that person requests otherwise.

9. If a complaint is dual-filed, either ASCHR or AERC can investigate the complaint of discrimination, depending upon which agency received the complaint first. Under the work-share agreement, each agency

agrees to review the final action by the agency that initially processed a co-jurisdictional complaint for adoption. If AERC conducts an investigation into a complaint that has been co-filed, AERC's findings are forwarded to our agency. Director of Special Investigations, Helen Sharratt, reviews AERC's findings to determine whether ASCHR will adopt the findings. She determines whether the AERC's investigation was adequate and whether she agrees with the recommendations and conclusions of AERC, given the requirements of AS 18.80. There have been a number of cases investigated by AERC that have not been adopted by ASCHR. But ASCHR has never reviewed or adopted any of AERC's findings that involve allegations of housing discrimination where a landlord has raised a freedom of religion defense.

10. I am familiar with the cases of *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199 (Alaska 1989) and *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994). I was employed as the staff attorney for AERC at the time of the *Foreman* case. The landlord in *Foreman* argued that AS 18.80.240(2) preempted the Municipality's right to enforce the Anchorage Municipal Code. I argued that AS 18.80.240(2) did not preempt AMC 5.20.020. Because of my familiarity with the case, I can represent that *Foreman* did not involve the freedom of religion issues that have been raised by the Bakers and Kevin Thomas in this case.

11. The complaints of housing discrimination in *Swanner* were co-filed with the AERC and ASCHR in accordance with the work-share agreement. Because the complaints were first filed with the AERC, AERC investigated the charges. AERC notified ASCHR of the filing,

and ASCHR sent Swanner a letter notifying him of the co-filing. This was ASCHR's only involvement in the *Swanner* case. ASCHR has never adopted AERC's findings in *Swanner*. For some unknown reason, AERC never sent its findings in *Swanner* to ASCHR for review.

12. Although I direct the agency's activities, I do not enforce the provisions of Title 18. I have no authority to order a party from engaging in any alleged discrimination. Enforcement of the Act is ultimately a decision reached by the commissioners after the conclusion of a hearing. As I noted earlier, I have never reviewed or taken any case forward to the commissioners where a landlord has raised religious issues in defense of a housing discrimination complaint. ASCHR has never had an opportunity to address the issues raised by the Bakers and Kevin Thomas in a hearing before the Commission. The issues raised by the Bakers and Kevin Thomas involve policy issues that must be determined by the commissioners. Therefore I have no authority to comment on the merits of the plaintiffs' claims.

Further your affiant saith naught.

/s/ Paula M. Haley
Paula M. Haley

SUBSCRIBED AND SWORN TO before me this 15th day of December, 1995.

/s/ Faye G. Fellers
Notary Public in and for Alaska
My Commission expires: 3/2/99

LETTER AGREEMENT
BETWEEN
ANCHORAGE EQUAL RIGHTS COMMISSION
AND
ALASKA STATE COMMISSION FOR HUMAN RIGHTS

I. PURPOSE

The Letter Agreement revokes and supersedes the Letter Agreement entered into on April 27, 1983. The purpose of this document is to clarify and specify the language contained in the *Memorandum of Understanding* entered into by the Anchorage Equal Rights Commission and the Alaska State Commission for Human Rights. Hereinafter the Alaska State Commission for Human Rights and the Anchorage Equal Rights Commission will be referred to as the party or parties.

II. LEGAL AUTHORITY

This document is intended to interpret and implement the *Memorandum of Understanding* and is not intended to supplant that document. To the extent that a section or sections of this document is found by a party or parties to the Memorandum to be inconsistent with the plain meaning of the Memorandum, that section or sections shall be of no force or effect. Sections of the Letter Agreement shall remain in force.

III. FILING COMPLAINTS OF DISCRIMINATION

A. The parties agree that the format for complaints shall parallel the format utilized by the U.S. Equal Employment Opportunity Commission (EEOC), and in appropriate circumstances, the format required by Title VIII of the Civil Rights Act of 1968.

B. The parties agree that the transcription of complaints shall be entered on the complaint form of the initial contact agency, and the resulting complaint forms together with transmittal documents shall be forwarded to the companion agency. In no event shall a complainant be permitted to deliver documents to the other party.

C. Each party shall review transmitted complaints for jurisdictional requirements and shall inform the worksharing agency of acceptance or rejection of complaints.

IV. DIVISION OF INITIAL COMPLAINT PROCESSING RESPONSIBILITIES

A. Each party shall inform inquirers of their right to file a complaint with the other party when appropriate.

B. Each party shall advise potential complainants that under the *Memorandum of Understanding* complaints will be dual-filed with the other party unless requested otherwise.

C. The Alaska State Commission for Human Rights agrees that the following types of dual-filed complaints may be waived to the Anchorage Equal Rights Commission for investigation as jurisdictional and other reasons require:

1. Complaints of housing discrimination occurring within the geographical boundaries of Municipality of Anchorage.

2. Complaints filed against Municipality of Anchorage, including the Anchorage School District.

V. RESOLUTION OF COMPLAINTS

A. The parties agree that the processing of all dual-filed complaints shall conform to the complaint processing procedural standards outlined in EEOC Order 916, Appendix A, or in the case of housing discrimination complaints, the Uniform Criteria for FHAP Payment.

B. The parties agree to notify one another on a monthly basis of closures of dual-filed complaints by submitting copies of closure documents from each closed case of the preceding month, as indicated below:

1. Administrative Closure: Closure Memo, Investigator's Memo or other justification, Closing Order and any other documents that may become necessary.

2. Settlement: Agreement signed by all parties, Closure Memo (indicating dollar value of monetary remedy), Closing Order and any other documents that may become necessary.

3. Determination or Findings of Fact: Investigator's Memo, Determination, Closing Order and any other documents that may become necessary.

4. The parties further agree to furnish the other with the last known name and address of respondent and complainant in each case resolution.

C. The parties agree that concurrence or nonconcurrence with the investigative results of dual-filed complaints processed by one party shall be determined by the party reviewing for adoption.

VI. IMPLEMENTATION OF WORKSHARING

A. Each party shall designate in writing a staff member to operate as a liaison to the other agency for the purpose of implementing the *Memorandum of Understanding* and the Letter of Agreement.

B. This Letter of Agreement shall become effective upon the date of endorsement and shall remain in effect until formal notice of termination is received by the parties. Formal notice of termination shall be provided 60 days prior to any intended termination.

C. Any changes or amendments to this Letter Agreement shall be in writing and shall be approved and executed by the Executive Directors of the respective parties.

DATED AT ANCHORAGE, ALASKA this [illegible] day of April, 1987.

ALASKA STATE COMMISSION FOR HUMAN RIGHTS

/s/ Janet L. Bradley
Janet L. Bradley
Executive Director

ANCHORAGE EQUAL RIGHTS COMMISSION

/s/ Paul L. Connerty
Paul L. Connerty
Executive Director

MEMORANDUM OF UNDERSTANDING BETWEEN THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS AND THE ANCHORAGE EQUAL RIGHTS COMMISSION

I. PURPOSE

The purpose of this Memorandum of Understanding is to provide for efficient coordination and cooperation in the handling of discrimination complaints pursuant to AS 18.80.010 et seq., and Title 5 of the Anchorage Municipal Code, (AMC 5.10.010. et seq.).

II. LEGAL AUTHORITY

A. The Alaska State Commission for Human Rights (ASCHR) is responsible for the administration and enforcement of the provisions of the Alaska Human Rights Law (AS 18.80.010 et seq.). As 18.80.220-.255 prohibits discriminatory practices in the State of Alaska on the basis of race, religion, color, national origin, age, sex, marital status, changes in marital status, pregnancy, parenthood and physical handicap. AS 18.80.220-.255 prohibits discrimination in employment, places of public accommodation, real property transactions, financing practices and government services.

B. The Anchorage Equal Rights Commission (AERC) is responsible for the administration and enforcement of the Anchorage Equal Rights Ordinance (AMC 5.10.010 et seq.). That ordinance prohibits discriminatory practices in employment, housing, public accommodations,

education, financing practices, and practices of the Municipality of Anchorage, on the basis of race, color, sex (including pregnancy and parenthood), religion, national origin marital status, age, or physical handicap.

III. FILING COMPLAINTS OF DISCRIMINATION

A. In order to facilitate the goals of AS 18.80. et seq. and AMC 5.10.010 et seq., ASCHR and AERC each designate the other as its agent to receive discrimination complaints.

B. Each agency shall inform a complainants of their rights to file with the other agency, and will endeavor to aid any person alleging discrimination to draft a charge in the manner which meets the requirements of the other agency.

C. Each agency shall forward all appropriate complaints to the other agency within 48 hours of filing or as soon thereafter as is practicable.

D. Each agency reserves the right to make an independent determination of jurisdiction pursuant to its own law or ordinance or complaints that are initially accepted as co-jurisdictional complaints.

IV. DIVISION OF INITIAL COMPLAINT PROCESSING RESPONSIBILITIES

A. ASCHR and AERC agree that the intent of the laws they administer can be served best by dividing primary responsibility for the resolution of complaints, reducing duplication of effort.

B. Each agency shall initially process all complaints it receives except for those assigned to ASCHR in paragraph IV. C. below.

C. ASCHR shall initially process the following categories of complaints:

1. Complaints which are filed more than 120 days after the date of the alleged unlawful act;

2. Complaints alleging unlawful discrimination within the State of Alaska, but not within the Municipality of Anchorage;

3. Complaints where an agency of the State of Alaska is a party;

4. Complaints against respondents which may be designated for initial processing by ASCHR;

5. Complaints filed by the Executive Director of ASCHR and related individual charges;

6. Complaints where ASCHR is a party to a concilliation [sic] agreement or a consent decree which is relevant to the disposition of the complaint; and,

7. Complaints alleging retaliation for filing a complaint with ASCHR or for cooperating with ASCHR.

D. Notwithstanding the provisions of paragraph IV. B. and C., ASCHR and AERC may request and be granted from the agency originally receiving the complaint the right to initially process any complaint. Such variations shall be consistent with the objectives of this Memorandum of Understanding.

E. If for any reason either agency determines it cannot process a complaint for which it bears initial responsibility pursuant to this agreement, that agency shall inform the other agency of its inability to process the complaint as soon as is practicable after the complaint is filed.

F. ASCHR and AERC shall implement their division of initial complaint processing responsibilities with due regard to the agency preferences of complainants.

V. RESOLUTION OF COMPLAINTS

A. ASCHR and AERC agree to utilize charge processing standards set forth in EEOC Order 916, Appendices A and B (Substantial Weight Review procedures).

B. ASCHR and AERC agree to make available to each other case files and other related documents obtained in processing co-jurisdictional complaints. ASCHR and AERC agree to comply with confidentiality requirements under state law and municipal ordinance.

C. Each agency agrees to review final action by the agency that initially processed a co-jurisdictional complaint for possible adoption under the reviewing agencies law or ordinance. ASCHR and AERC agree to notify each other before a potential release of case files and other related documents obtained in processing co-jurisdictional complaints. When one agency does not concur with the result reached by the other agency, the reasons for nonconcurrence shall be provided.

VI. IMPLEMENTATION OF WORKSHARING

A. Each agency shall designate one person as a liaison officer for interagency contacts concerning day-to-day operations under this Memorandum of Understanding.

B. ASCHR and AERC shall confer periodically during the operation of this agreement to ensure that co-jurisdictional complaints are processed with due regard to the rights, duties and legal obligations of the agencies and parties to complaints.

C. ASCHR and AERC shall support each other in all reasonable efforts to ensure sufficient funding to effectively enforce the applicable state and municipal laws and ordinances.

D. This agreement shall become effective on the date of endorsement, and will remain in effect until formal written notice of termination is received by the participating agencies. Formal written notice of termination shall be provided sixty (60) days prior to any intended termination.

DATED AT ANCHORAGE, ALASKA, this 24th day of July, 1982.

ALASKA STATE COMMISSION FOR HUMAN RIGHTS

by: /s/ Dorothy M. Larson
DOROTHY LARSON
Chairperson

ANCHORAGE EQUAL RIGHTS COMMISSION

by: /s/ James W. Kelly
JAMES W. KELLY
Chairperson